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No. 90-5538

In the Supreme Court of the United States

OCTOBER TERM, 1990

ZAKHAR MELKONYAN, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

In a Social Security case that has been remanded to the agency by the district court, does the 30-day limitations period for applying for attorney's fees under the Equal Access to Justice Act begin to run when an administrative decision becomes final and not appealable?

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STATEMENT

1. a. On May 28, 1982, petitioner filed an application for disability benefits under the Supplemental Security Income (SSI) program established by Title XVI of the Social Security Act, 42 U.S.C. 1381 *et seq.* On January 30, 1984, an administrative law judge determined after a hearing that petitioner did not have a "severe" impairment and therefore was not disabled within the meaning of the Act. Tr. 6-11;[1] see 20 C.F.R. 416.921; *Bowen* v. *Yuckert*, 482 U.S. 137 (1987). The Appeals Council denied review of the ALJ's decision. Tr. 2. On June 8, 1984, petitioner filed a complaint in the United States District Court for the Central District of California,

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[1] "Tr." refers to the certified copy of the transcript of the administrative record that was filed by the Secretary with the district court, pursuant to 42 U.S.C. 405(g), when petitioner first sought judicial review.

seeking judicial review of the Secretary's decision pursuant to 42 U.S.C. 1383(c)(3), which incorporates the judicial review provisions of 42 U.S.C. 405(g). J.A. 19, 28.

b. On May 30, 1984, shortly before filing his civil action, petitioner filed a second application for SSI benefits, supported by new evidence of disability. On the basis of this second application, petitioner was found to be disabled as of the date it was filed. On October 18, 1984, petitioner filed a motion for summary judgment in his civil action for judicial review of the Secretary's decision denying his first application. That motion was accompanied by the new evidence of disability filed with his second application. J.A. 28.

While petitioner's motion for summary judgment was pending, the Appeals Council, after reviewing the developments in connection with petitioner's second application, decided that it would accept a voluntary remand of the case for further administrative proceedings.[2] The Secretary offered to stipulate to such a remand, but petitioner's counsel refused to do so. Accordingly, on December 18, 1984, the Secretary filed a motion requesting that the court, "pursuant to [petitioner's] prayer for relief in his complaint, order this case be remanded" to the Secretary "for further * * * proceedings." J.A. 6; see J.A. 19, 28.[3] On December 27, 1984, petitioner filed an objection to the Secretary's motion to remand. J.A. 7-8.

[2] Disability benefits may not be paid under the SSI program for any period preceding the date on which an application is filed. 20 C.F.R. 416.501; compare 42 U.S.C. 402(j)(1) (under Title II, benefits may be paid for period of up to 12 months before application was filed), discussed in *Schweiker* v. *Hansen*, 450 U.S. 785, 786-787 (1981). Thus, in finding petitioner disabled on the basis of his second application, the Secretary could not find petitioner disabled as of the date of his first application without further consideration of the first application.

[3] In his prayer for relief, petitioner requested, *inter alia*, that his "claim for supplemental security income be allowed, or in the alternative, that the case be remanded for further proceedings." J.A. 5.

But petitioner subsequently changed his mind, and on March 28, 1985, he filed an "*ex parte* application for an order remanding this case to the [Secretary,] with the belief that this [would] expedite resolution of [petitioner's] claim." J.A. 9-10.[4] In response, the district court entered its "judgment" in the case on April 3, 1985. J.A. 11. The judgment read in its entirety (J.A. 11):

> Defendant's motion to remand, concurred in by plaintiff, is granted. The matter is remanded to the Secretary for all further proceedings.

The judgment did not state that the court was retaining jurisdiction pending the outcome of the proceedings before the Secretary, and it did not order either party to make any further filing in the court at the conclusion of the post-remand administrative proceedings.

Following the remand, the Appeals Council, on May 7, 1985, rendered a decision in which it (1) vacated its prior order refusing review of the ALJ's January 30, 1984, denial of petitioner's first application, (2) vacated the ALJ's decision as well, and (3) found petitioner disabled as of the date (May 28, 1982) on which he had filed his first application. J.A. 14-16. The Appeals Council determined, based on pulmonary function studies submitted in connection with petitioner's second application, that petitioner's impairment was "severe" and that he had been limited to performing "medium" work since May 28, 1982. The Appeals Council then concluded that under the medical-vocational guidelines approved by this Court in *Heckler* v. *Campbell*, 461 U.S. 458 (1983), a finding of disability was required for a person of petitioner's age, education, and work experience who could perform only "medium" work. J.A. 16 (citing 20 C.F.R. Pt. 404, Subpt. P, App. 2, Table 3, Rule 203.10 (as made applicable to the SSI program by 20 C.F.R. 416.969)).[5]

[4] In the alternative, petitioner requested that the magistrate issue his report and recommendation. J.A. 9-10.

[5] The Appeals Council's decision concluded by stating that "[t]he component of the Social Security Administration responsible for

2. On May 19, 1986, more than one year after the Appeals Council's decision, petitioner filed an application in the district court for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). J.A. 29.[6] The magistrate recommended that the fee application be denied. J.A. 19-21. The magistrate concluded that the Secretary's pre-remand decision denying petitioner's first application was "substantially justified" within the meaning of EAJA, 28 U.S.C. 2412(d)(1)(A), because the medical reports in the original record did not indicate that he was disabled. J.A. 20-21. On February 17, 1987, the district court, following the magistrate's recommendation, entered an order denying petitioner's application for attorney's fees. J.A. 22.

3. The court of appeals vacated the district court's judgment denying petitioner's application for attorney's fees on the merits and remanded the case with instructions to dismiss the fee application as untimely. J.A. 27-36.

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authorizing supplemental security income payments will advise the claimant regarding the nondisability requirements and, if eligible, the amount and month(s) for which payment will be made." J.A. 16; see also J.A. 12 (similar statement in cover letter to petitioner's counsel). In September 1985, following the necessary computations, petitioner was paid $7,910.39 in SSI benefits for the period from May 28, 1982, to May 30, 1984 (the date of petitioner's second application, on the basis of which he was already receiving benefits). J.A. 24-26. Petitioner did not seek review of the amount of benefits to which he was found to be entitled. See pages 40-41, *infra*.

[6] Petitioner sought attorney's fees in the amount of $4,522.50 (59.5 hours at a rate of $75 per hour), plus $60 in costs. The fees were entirely for services performed by counsel prior to the district court's judgment remanding the case to the Secretary, except for (1) counsel's notifications to petitioner of the district court's judgment remanding the case and of the Appeals Council's post-remand decision, and (2) counsel's preparation of the attorney's fee application. See Decl. of John Ohanion, dated May 19, 1986, appended to Not. of Mot. and Mot. of Pltf. for Award of Attorneys Fees Under The Equal Access to Justice Act.

a. The court of appeals pointed out that under 28 U.S.C. 2412(d)(1)(B), an application for EAJA fees must be filed within 30 days of the "final judgment in the action," a term that is defined as "a judgment that is final and not appealable." J.A. 30 (quoting 28 U.S.C. 2412(d)(1)(B) and (d)(2)(G)). Applying that definition, the court of appeals first concluded that the district court's April 5, 1985, judgment remanding the case to the Secretary could not itself be the "final judgment" for purposes of EAJA, because both parties anticipated that there would be further proceedings after remand. J.A. 30-31. The court then noted that there was no other order of the district court that could serve as the "final judgment" for these purposes, since the district court did not enter a new judgment (or any other order) after the Appeals Council rendered its decision on remand. J.A. 31.

In these circumstances, the court held that the Secretary's final decision after remand—which was the Appeals Council's May 7, 1985, decision finding petitioner disabled as of the onset date alleged in his first application—must be regarded as the "final judgment" for purposes of commencing the 30-day period for filing a fee application under EAJA. In the court's view, that decision satisfied EAJA's definition of a "final judgment," since it was "final and not appealable" by either party. 28 U.S.C. 2412(d)(2)(G). The court explained that because 42 U.S.C. 405(g) authorizes judicial review only by an "individual" who is aggrieved by the Secretary's final decision after a hearing, "the Secretary would not have standing or reason to complain of his own final decision." J.A. 33. "Likewise," the court continued, "if a claimant wholly prevails on his claim, he would have no reason to appeal that decision." *Ibid.*

The court of appeals recognized that, under 42 U.S.C. 405(g), a claimant ordinarily has 60 days within which to seek judicial review of an Appeals Council decision (plus five days between the date of the Appeals Council decision and the date on which the decision is presumed

to be received under governing regulations). J.A. 32 (citing 20 C.F.R. 416.1401, 416.1481, 416.1483 (1988)). Because a typical Appeals Council decision would not be final and unreviewable until after expiration of that 65-day period for seeking judicial review, the court believed that the 30-day period within which to file an EAJA application based on a post-remand decision by the Appeals Council ordinarily would not begin to run until after that 65-day period had passed.[7] But the court concluded that where, as here, the Secretary determines that the claimant was disabled as of the onset date alleged in the claimant's original application, the 30-day period begins to run immediately upon the date of the Appeals Council's decision, since that decision is "not appealable" by either the claimant or the Secretary. J.A. 32. Because petitioner did not seek EAJA fees until more than one year after the Secretary rendered his fully favorable post-remand decision, and because in its view the 30-day filing period under EAJA is jurisdictional, the court of appeals held that the district court lacked jurisdiction to entertain petitioner's EAJA application. J.A. 29, 33.

b. In so ruling, the court of appeals declined to follow the "different approach" adopted by the Fourth Circuit in *Guthrie* v. *Schweiker*, 718 F.2d 104 (1983). J.A. 33-35. There, the Fourth Circuit relied on language in the sixth sentence of 42 U.S.C. 405(g) that requires the Secretary, after a remand covered by that sentence, to file with the district court his modified findings of fact and decision, as well as a transcript of the additional administrative record. 718 F.2d at 106; see *Sullivan* v. *Finkelstein*, 110 S. Ct. 2658, 2664-2665 (1990). The Fourth Circuit reasoned in *Guthrie* that after such a filing, the district court should enter an order affirming, modifying, or reversing the Secretary's post-remand decision; such a judicial order could then serve as the "final

[7] The court of appeals presumably was of the view that if the claimant *did* seek judicial review within the 65-day period, an EAJA application could be filed within 30 days after the district court's judgment terminating that component of the proceedings became final and not appealable.

judgment" that would commence the running of the 30-day filing period under EAJA. See J.A. 33 (citing 718 F.2d at 106).

The Ninth Circuit in this case found the *Guthrie* approach "troublesome." J.A. 34. It noted that 42 U.S.C. 405(g) does not confer upon the district court independent power to review any post-remand filing by the Secretary.[8] Accordingly, the court of appeals reasoned, the merits of the Secretary's post-remand decision, like the Secretary's original decision, may be reviewed by the district court only if the claimant seeks judicial review of that decision within the 60-day period allowed by 42 U.S.C. 405(g). J.A. 34. Unless the ordinary requirements for judicial review are met, the court continued, it was "at a loss to find a basis for a district court to enter any order or judgment affirming, modifying, reversing or remanding the Secretary's post-remand filing." *Ibid.* Nor could the court below "see any advantage to such an approach," because "[i]f the Secretary's decision is wholly in favor of the claimant," there is no "need for overburdened district courts to deploy scarce judicial resources in a sua sponte 'affirmation' of uncontested eligibility decisions." *Ibid.*

In addition, the court of appeals found it significant that *Guthrie* was decided before the 1985 amendments to EAJA, which "effectively redefined" the term "final judgment" to mean a "judgment that is final and not appealable." J.A. 34-35 (quoting 28 U.S.C. 2412 (d)(2)(G)). Although the Fourth Circuit had assumed in *Guthrie* that the term "final judgment" referred only to an order of the sort a court may enter, as under Fed. R. Civ. P. 54, the court below found no reason in the amended version of EAJA to conclude that the term is so

[8] The Ninth Circuit apparently was of the view that Section 405(g) requires the Secretary to file the post-remand decision, findings, and transcript with the district court in *all* remanded cases. See J.A. 34. However, this Court's subsequent decision in *Sullivan* v. *Finkelstein* makes clear that this requirement applies only to the limited category of cases covered by the sixth sentence of Section 405(g). See pages 26-27, *infra*.

limited. The court of appeals therefore held that the term "judgment" in this context does not require an order by a court, but may instead consist of a final and unreviewable administrative decision following a remand from a court. J.A. 34-35.

c. Finally, the court of appeals noted that its approach "not only sets definite limits for purposes of finality, but it also benefits individuals seeking EAJA awards under section 2412 in similar circumstances." J.A. 35. "Rather than wait for the Secretary to make a post-remand filing and wait for that filing to be affirmed by the district court," the court explained, "such individuals may seek EAJA awards as soon as the agency's action on remand becomes a 'final judgment' under section 2412(d)(2)(G)." *Ibid.*

SUMMARY OF ARGUMENT

1. a. The holding below—that the 30-day limitations period for filing an EAJA application begins to run when the Secretary's post-remand decision becomes final and not appealable—is correct. The decision is consistent with the governing statutes and with the analysis in this Court's decisions in *Sullivan* v. *Hudson*, 490 U.S. 877 (1989), and in *Sullivan* v. *Finkelstein*, 110 S. Ct. 2658 (1990). Moreover, the rule adopted by the court below serves to benefit all concerned—the courts, private claimants, and the Secretary—by eliminating any need for pointless filings and rulings and by expediting the process of considering applications for EAJA awards.

Petitioner's approach, in contrast, would impose on the parties and the courts a cumbersome and unnecessary procedure that finds no basis in any governing statute. It would require that before the limitations period for filing an EAJA application can begin to run in a case that has been remanded to the Secretary, the Secretary's decision on remand must be filed with the district court, the district court must enter some sort of order that would constitute a "final judgment," and the time for appealing from that order must expire without an appeal being taken.

b. The term "final judgment," as used in EAJA, is broad enough to encompass a post-remand administrative determination that is final and no longer subject to appeal. This conclusion is buttressed not only by the definition of the term "judgment" in both standard and legal dictionaries, but by the context in which the term is used in EAJA itself and by the legislative history of the 1985 provisions clarifying the meaning of the statute. A critical aspect of that clarification was the rejection of an "overly technical" construction of the phrase that tied it too closely to the concept of a final judgment of a district court.

Moreover, the construction of EAJA adopted by the court below is supported by this Court's decisions in *Hudson* and in *Finkelstein*. The Court in *Hudson*—focusing on the interpretation of EAJA—rejected a narrow definition of "civil action" that limited its scope to proceedings in district court and instead endorsed a definition that embraced administrative proceedings on remand from the district court. By the same rationale, the term "final judgment," as used in EAJA, should be construed to embrace a final, non-appealable decision rendered in those same administrative proceedings. And in *Finkelstein*, the Court held that for substantive purposes (and for purposes of determining appealability), an action in the district court comes to an end when it is remanded to the Secretary for further proceedings; nothing remains to be done in the district court in order to achieve "finality" once the proceedings before the Secretary have terminated in a final and unreviewable administrative decision.

The rationale of the *Finkelstein* decision, which strongly supports the result below, does not directly apply to a district court order sending a case back to the Secretary under the sixth sentence of 42 U.S.C. 405(g), and thus further action by the district court may be a prerequisite to the existence of a "final judgment" in such cases. But that question need not be resolved here,

since the district court's order of remand in this case was *not* issued pursuant to the sixth sentence of Section 405(g). Rather, like the order in *Finkelstein*, it served to terminate the proceedings in the district court.

c. The court of appeals decisions relied on by petitioner do not support his position. Each of those cases was decided before this Court's decisions in *Hudson* and *Finkelstein*, and the premises about the operation of 42 U.S.C. 405(g) on which they rest have since been shown to be false. Moreover, the same mistaken premises underlie the passages in the 1985 legislative history on which petitioner also relies.

d. Many practical considerations militate in favor of the approach adopted below, especially if, as we urge, the approach is modified so that the time in all cases begins to run only when the period for seeking further review of the Secretary's decision has expired. The approach, as noted, has the advantage of eliminating pointless and unnecessary steps and of expediting the consideration of EAJA applications. And, particularly if our modification is accepted, it would have none of the disadvantages attributed to it in petitioner's brief.

2. There is no reason for this Court to exempt petitioner from the time limits imposed by law for the filing of an EAJA application. The question of the retroactive application of this Court's (or the Ninth Circuit's) ruling as a general matter may properly be left to the lower courts in the first instance. And if the Court believes that retroactivity should be addressed specifically with respect to petitioner's application, we suggest that the Court remand to the court of appeals for further proceedings on that issue, since it was not addressed in the decision below.

In any event, as petitioner recognizes, a jurisdictional ruling must be given retroactive effect, and the time limit for filing EAJA applications remains a jurisdictional one, even after this Court's decision in *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453 (1990). Moreover, even if equitable tolling, or a prospective ruling, were not completely foreclosed in this context, there is no basis on this record for excusing petitioner's filing delay of over nine months under the retroactivity principles of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971): the Ninth Circuit did not overrule clearly established circuit precedent in rendering the decision below; prospective application is not necessary to fulfill EAJA's purpose of removing a possible obstacle to retaining counsel to challenge governmental action, since petitioner and others raising this issue have had the assistance of counsel; and retroactive application will not produce unfair results, in light of petitioner's failure to press his attorney's fee claim promptly.

ARGUMENT

I. IN AN ACTION FOR JUDICIAL REVIEW UNDER THE SOCIAL SECURITY ACT IN WHICH THE DISTRICT COURT HAS REMANDED THE CASE TO THE SECRETARY, THE 30-DAY LIMITATIONS PERIOD FOR FILING AN APPLICATION FOR ATTORNEY'S FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT BEGINS TO RUN IF AND WHEN THE SECRETARY'S POST-REMAND DECISION BECOMES FINAL AND NOT APPEALABLE

A. Introduction

The court of appeals correctly held that, in circumstances where a Social Security case is remanded to the Secretary for further administrative proceedings, the 30-day limitations period for filing an application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(B), commences when the post-remand decision of the Secretary become final and not appealable. That holding comports with the text and purposes of 42 U.S.C. 405(g) and of EAJA, as well as with the analytical framework of this Court's decisions in *Sullivan* v. *Hudson*, 490 U.S. 877 (1989), and *Sullivan* v. *Finkelstein*, 110 S. Ct. 2658 (1990).

The three other courts of appeals that have considered the question since *Hudson* and *Finkelstein* have agreed with the Ninth Circuit's ruling in this case. See *Richard*

v. *Sullivan*, No. 90-4597 (5th Cir. Feb. 28, 1991); *Buck* v. *Secretary of HHS*, No. 89-4130 (6th Cir. Jan. 18, 1991);[9] *Jabbay* v. *Sullivan*, 920 F.2d 472 (7th Cir. 1990). These decisions follow a straightforward rule that comports with the statutory scheme and common sense. If the claimant does not seek further review of the Secretary's post-remand decision within the time allowed, then all proceedings on the question of his disability (the subject matter of the civil action) are at an end. Since neither the Secretary nor the claimant may seek judicial review on the merits at that point, there is no occasion under 42 U.S.C. 405(g) for the court to take further action. All that remains (aside from the often ministerial task of calculating and paying benefits) is for the claimant to seek attorney's fees under EAJA.[10] The decision below permits the claimant to file for and be awarded EAJA fees immediately when the post-remand decision becomes final, without awaiting further action by the Secretary and the court; and the triggering of the 30-day filing period at that point ensures that all proceedings concerning the claimant's disability will be brought promptly to a close. The decision below also properly places the burden on the claimant—the moving party on the EAJA question—to invoke the jurisdiction of the court by filing a fee petition within 30 days.

As petitioner points out (Br. 16-19), several court of appeals decisions prior to *Hudson* and *Finkelstein* had suggested a different approach. See *Guthrie* v. *Schweiker*, 718 F.2d at 106; *Brown* v. *Secretary of HHS*, 747 F.2d 878, 884-885 (3d Cir. 1984); *Taylor* v. *Heckler*, 778 F.2d 674, 677 (11th Cir. 1985). But the essential premises of those decisions have since been shown by *Hudson* and *Finkelstein* to be wrong. See pages 30-32, *infra*. Moreover, those decisions would superimpose on 42 U.S.C. 405(g) certain mandatory procedures that have no basis in law and that may complicate and delay the final resolution of disability claims and fee petitions.

[9] The Sixth Circuit previously had reached the same result in an unpublished decision, *Gordon* v. *Secretary of HHS*, No. 90-1206 (Oct. 15, 1990).

[10] The attorney may also seek to recover attorney's fees from the claimant pursuant to 42 U.S.C. 406 in Title II cases. See pages 38-40, *infra*.

Under petitioner's view, if for any reason a claimant does not seek judicial review of the Secretary's post-remand decision, and thus allows that decision to become final and nonreviewable, there still is no "final judgment" in the case, for purposes of EAJA, unless and until the district court also enters some sort of order. It follows, under petitioner's position, that for an EAJA award to be available in these circumstances, the Secretary must make a filing with the district court following completion of the proceedings on remand in *every* case; and after the Secretary makes such a filing, the district court must enter an order affirming, modifying, or reversing the Secretary's final post-remand decision in *every* case. Such an order by the district court, once it becomes final and not appealable, could then serve as the "final judgment" for purposes of commencing the 30-day filing period under EAJA. See Pet. Br. 17-19, 23, 25-26, 29-31. The Secretary and the district court apparently would have to follow this procedure even if neither the claimant nor the Secretary wanted to present any issue to the court concerning the merits of the Secretary's post-remand decision, and indeed even if the claimant had no intention of actually applying for EAJA fees.[11]

The elaborate construct petitioner proposes finds no basis in 42 U.S.C. 405(g), the statutory provision enacted by Congress to govern judicial review of decisions by the Secretary on claims for Social Security benefits. Specifi-

[11] Perhaps the claimant could initiate the process by filing the decision on remand with the district court, and by requesting the district court to enter an order affirming it, if the Secretary did not do so. But petitioner did not follow that course. Moreover, as the delay in this case illustrates, it does not appear that there would be any time constraints on such action by the claimant (unless the 60-day period in 42 U.S.C. 405(g) would apply to his filing). Thus, the period for seeking an EAJA award might be indefinitely extended.

cally, nothing in 42 U.S.C. 405(g) requires a filing in court following every post-remand decision, including those that the claimant has allowed to become final and not appealable, nor does anything in Section 405(g) contemplate any further role for the district court in such cases. See pages 23-25, *infra*.[12] Despite this statutory silence, petitioner would impose two additional layers of mandatory procedure—a filing with the district court of the decision on remand, followed by an order of the district court affirming, modifying, or reversing the Secretary's uncontested decision on the merits—solely to facilitate EAJA applications. Petitioner seeks, in other words, to make the EAJA tail wag the Section 405(g) dog.

The flaw in this approach is not only its cumbersomeness but its conflict with the design of EAJA—to take the procedures applicable to the particular civil action as it finds them, and to effectuate the purposes of EAJA within that statutory context. See *Hudson*, 490 U.S. at 889 ("we must endeavor to interpret the fee statute in light of the statutory provisions it was designed to effectuate"). It therefore is necessary to locate within the procedures that have been independently prescribed by statute and rule the decision that may most properly be regarded as the "final judgment" in the case for purposes of EAJA's 30-day filing requirement. In the present context, that decision is the post-remand administrative decision of the Secretary, once it has become "final and not appealable." 28 U.S.C. 2412(d)(2)(G).

The rule petitioner proposes also presents significant practical difficulties that can be avoided under the Ninth Circuit's construction. First, petitioner's rule would require many pointless post-remand filings in the district courts and pointless post-remand orders by those courts,

[12] A subsequent filing with the district court is required only in the special category of cases covered by the sixth sentence of Section 405(g). Even then, it is not clear that the filing requirement should apply where the Secretary has rendered a fully favorable decision on remand, since there is no longer a live case or controversy regarding the claimant's disability. See pages 26-27 & note 24, *infra*.

for in a large number of cases arising under the vast Social Security programs, the claimant will not apply for the EAJA fees that petitioner's proposal purports to facilitate.[13]

Second, even in those cases in which the claimant might ultimately file an application for EAJA fees, petitioner's submission would require unnecessary steps and complications in the fee-application process. Under the approach adopted by the Ninth Circuit and the other courts that have followed it, the claimant initiates the EAJA fee process by filing an application with the court—an application the government may then choose not to contest. That streamlined procedure is especially appropriate in the present context, since the number of EAJA appli-

[13] In fiscal year 1989, 7,921 new cases were filed in the district courts under the Social Security Act; 6,616 cases pending during that year resulted in final court decisions (not including remands); and 1,856 of those dispositions were reversals. In addition, 6,432 remands were processed by the Appeals Council during 1989. See Social Security Administration, *Annual Report to the Congress* 29 (Apr. 1990). Under petitioner's theory, a post-remand filing with the district court was evidently required in all 6,432 of the latter cases.

By contrast, the *1990 Annual Report of the Director of the Administrative Office of the United States Courts* states (at 1-26 (Table 21)) that in 1990, 375 EAJA applications were filed in the district courts in cases involving HHS (342 of those applications were granted). HHS's own statistics show a higher rate of EAJA filings. We have been informed by HHS that data it has generated show that in fiscal year 1990, there were 4,343 remands processed by the Appeals Council, 2,696 (62%) of which were favorable to the claimant, and 1,377 court decisions favorable to the claimant, resulting in a total of 4,073 favorable decisions. Further, in fiscal year 1990, EAJA fees were awarded in 1,697 (41.7%) of those cases. By any measure, then, there are many post-remand administrative decisions that are favorable to the claimant but that do not lead to an EAJA application.

The same HHS data show that in prior years, the percentage of favorable decisions on remand was generally higher (ranging from 68% in 1986 and 1987 to 80% in 1989). The percentage of favorable decisions overall (court and post-remand) in which EAJA fees have been awarded has grown steadily from 8.4% in 1985, to 21.4% in 1989, to 41.7% in 1990.

cations in Social Security cases is substantial, while the amount of EAJA awards in such cases is relatively small. See *Commissioner, INS* v. *Jean*, 110 S. Ct. 2316, 2322 n.12 (1990) (noting that 90% of EAJA fee awards in 1989 were in HHS cases and that these awards averaged less than $3000 each). By contrast, petitioner's position apparently would require a filing of the Secretary's decision with the court as a precondition to any possible award of fees, and the district court apparently would be required to enter an order on the merits, constituting the "judgment" in the case, in addition (and perhaps prior) to passing on the EAJA application. As the court below observed, if the Secretary's post-remand decision is fully favorable to the claimant (or if the claimant for some other reason elects to forgo further review of that decision), there is no "need for overburdened district courts to deploy scarce judicial resources in a sua sponte 'affirmation' of uncontested eligibility decisions." J.A. 34.

Third, the steps petitioner urges this Court to mandate would lead to delay in the EAJA application process itself. By contrast, as the court below explained, its approach "not only sets definite limits for purposes of finality, but it also benefits individuals seeking EAJA awards." J.A. 35. This is so because "[r]ather than wait for the Secretary to make a post-remand filing and wait for that filing to be affirmed by the district court, such individuals may seek EAJA awards as soon as the agency's action on remand becomes a 'final judgment' under section 2412(d)(2)(G)." *Ibid.*

These practical considerations weigh strongly in favor of the Ninth Circuit's approach, because it "comports with the intent of EAJA to lessen the economic burden on the individual who must litigate against the government in order to vindicate his rights." Note, *EAJA: An Analysis of the Final Judgment Requirement As Applied to Social Security Disability Cases*, 58 Ford. L. Rev. 1269, 1285 (1990); see *id.* at 1282, 1285-1287. Other courts of appeals have made the same point. See *Richard* v. *Sullivan*, slip op. 9 ("To require some process of "certification' or 'validation' by the district court would result only in a useless exercise wasting judicial resources."); *Jabbay* v. *Sullivan*, 920 F.2d at 474 (approach advocated by petitioner "leads to unnecessary delays in litigation"). This Court has stressed the importance of such considerations, as well as simplicity of judicial administration, in the interpretation and application of EAJA. See *Commissioner, INS* v. *Jean*, 110 S. Ct. at 2321-2323 & n.14; *Sullivan* v. *Hudson*, 490 U.S. at 883-884; *Pierce* v. *Underwood*, 487 U.S. 552, 559-563 (1988).

B. It Is Consistent With 42 U.S.C. 405(g) And With EAJA To Hold That A Post-Remand Decision Of The Secretary That Is Final And Not Appealable Is A "Final Judgment" For Purposes Of EAJA

As relevant here, EAJA provides that "a court shall award to a prevailing party * * * fees and other expenses * * * incurred by that party in any civil action * * *, including proceedings for judicial review of agency action, brought by or against the United States * * *, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A). Section 2412(d)(1)(B) provides that "[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses." The term "final judgment" in turn is defined to mean a judgment that is "final and not appealable." 28 U.S.C. 2412(d)(2)(G). The Ninth Circuit's decision is fully consistent with these provisions.

1. EAJA clearly presupposes the independent existence of an order in a "civil action" that may also serve as the "final judgment" for purposes of triggering the 30-day period for seeking an EAJA award. In the present case, the court of appeals' conclusion—that the Appeals Council decision became the "final judgment" once it became final and unreviewable[14]—seems inescapable. As the

[14] As explained below (see pages 35-38, *infra*), we believe that the Appeals Council's post-remand decision became "final and not

court of appeals pointed out, the district court's judgment remanding the case to the Secretary was not a final judgment for EAJA purposes at the time it was entered, since both parties and the court contemplated that there would be further proceedings before the Secretary on the disability issue;[15] and after completion of the proceedings on remand, the district court did not enter another order that could be deemed a "final judgment." See J.A. 31.

Petitioner contends (Br. 12-15), however, that only an order entered by a court can be a "final judgment" for these purposes. Accordingly, petitioner takes the position that even after expiration of the 60-day period for seeking judicial review of the Appeals Council's post-remand decision, that decision was not a "final judgment." On this theory, there still was no "final judgment" in this case when the Ninth Circuit rendered its decision, even though almost 4½ years had elapsed since the Appeals Council rendered its decision, because the district court had not entered an order affirming, modifying, or reversing the Appeals Council's decision—the action petitioner believes is necessary to trigger the limitations period for filing an EAJA fee.[16]

Neither the term "judgment" nor EAJA's definition of a "final judgment" (in Section 2412(d)(2)(G)) is limited to an order entered by a court. A leading American dictionary defines "judgment" as "a formal decision or determination given in a cause by a court of law *or other tribunal*," *Webster's Third New International Dictionary* 1223 (1986) (emphasis added), a definition plainly broad enough to encompass a decision by the Appeals Council. Petitioner objects (Br. 12-13) that this is a definition for laypersons, and in support of his argument that the legal definition is narrower, asserts (Br. 12-13) that nowhere in the definition of "judgment" in *Black's Law Dictionary* 841-842 (6th ed. 1990) is there any suggestion that the term extends to decisions of administrative tribunals. Yet, two sentences after the excerpt petitioner quotes (Br. 12), the definition states that a judgment is a "[d]ecision or sentence of law, given by a court of justice *or other competent tribunal*, as the result of proceedings instituted therein." *Black's* 842 (emphasis added). And still later, the *Black's* definition states that the "[t]erms 'decision' and 'judgment' are commonly used interchangeably." *Ibid.*

Consistent with the dictionary definitions, an adjudicatory decision by an administrative tribunal is often accorded the same effect for purposes of issue and claim preclusion as the judgment of a court. See *University of Tennessee* v. *Elliott*, 478 U.S. 788, 796-799 (1986); *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966) (noting that *res judicata* applies where an administrative agency sits in a "judicial" capacity). Indeed, decisions of administrative agencies are regarded as a proper subject of the Restatement of Judgments.[17]

To be sure, "judgment" may also be used as a term of art having special application to judicial proceedings. But in that setting, a "judgment" typically refers to an

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appealable" not on the date of its issuance, as the Ninth Circuit held, but on expiration of the period within which petitioner could have sought judicial review. This difference, however, has no effect on the outcome of this case.

[15] See note 20, *infra*. When it amended EAJA in 1985, Congress rejected provisions in the House bill that would have permitted a claimant to apply for fees within 30 days of a remand order in an action under 42 U.S.C. 405(g) or 1383(c)(3) and declared the claimant a "prevailing party" at that point. H.R. 5479, 98th Cong., 2d Sess. §§ 2(a)(3) and (b)(3) (1984); see H.R. Rep. No. 992, 98th Cong., 2d Sess. 2-3, 12-13 (1984); 130 Cong. Rec. 29,276, 30,151, 30,152, 30,153-30,154, 31,406-31, 407 (1984).

[16] On June 27, 1990, pursuant to the Ninth Circuit's mandate, the district court entered a judgment and order dismissing the action.

[17] See Restatement (Second) of Judgments § 83, at 269 (1982) (quoted in *University of Tennessee* v. *Elliott*, 478 U.S. at 798 n.6):

> Where an administrative forum has the essential procedural characteristics of a court, . . . its determinations should be accorded the same finality that is accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court.

order of a court that *is* appealable. See Fed. R. Civ. P. 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies."); *Finkelstein*, 110 S. Ct. at 2665 ("appealable" is "a meaning with which 'final' is usually coupled"). EAJA's definition fundamentally departs from that usage by requiring that an order be "final and *not* appealable" in order to be a "final judgment". 28 U.S.C. 2412(b)(2)(G) (emphasis added). This significant departure from the usual characteristics of a "judgment" entered by a court reinforces the conclusion that Section 2412(b)(1)(B) should not be read implicitly to limit the "final judgment[s]" that trigger the 30-day filing period to orders that have been entered by courts. Cf. *Bell* v. *United States*, 462 U.S. 356, 360-361 (1983).

2. Our reading of the statutory text is supported by its legislative history. The definition of the term "final judgment" in 28 U.S.C. 2412(d)(2)(G) was added in 1985 [18] to resolve a conflict in the lower courts on the question whether a "judgment" was to be regarded as "final" for EAJA purposes when it was entered, or only when the period for taking an appeal had lapsed. In holding that the 30-day period began to run immediately upon entry of the court's judgment, the Ninth Circuit in *McQuiston* v. *Marsh*, 707 F.2d 1082, 1085 (1983), had simply concluded, without analysis, that the term "final judgment" "should be defined by its common usage in contexts such as 28 U.S.C. 1291, Fed. R. App. P. 4(a), and Fed. R. Civ. P. 54." By contrast, in holding that a district court's judgment is not "final" for these purposes until after the time for taking an appeal has expired, the Seventh Circuit in *McDonald* v. *Schweiker*, 726 F.2d 311 (1983), had rejected what it regarded as *McQuiston*'s superficial and technical construction of "final judgment," observing that the term "does not have a single fixed meaning" and that it therefore is necessary to find the meaning that is "inferable from context." *Id.* at 313. Viewing its choice to be whether the 30-day

[18] Pub. L. No. 99-80, § 2(c)(2), 99 Stat. 185.

period "runs from the end of the district court proceedings or from the end of all the proceedings," the Seventh Circuit was heavily influenced by practical considerations and chose the latter construction. *Id.* at 314; accord *Massachusetts Union of Public Housing Tenants* v. *Pierce*, 755 F.2d 177, 179 (D.C. Cir. 1985).

The clarification of the term "final judgment" in the 1985 amendments was expressly intended to "ratif[y] the approach taken by the courts in" *McDonald* and *Massachusetts Union*. See H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. II, at 6 n.26 (1985); S. Rep. No. 586, 98th Cong., 2d Sess. 16 (1984). By the same token, the 1985 amendments manifest a rejection of the narrow and technical construction of the term "final judgment" in *McQuiston*, based on 28 U.S.C. 1291, Fed. R. App. P. 4(a), and Fed. R. Civ. P. 54—the types of sources to which petitioner would look for guidance. In fact, the House Report explicitly states that "final judgment" and several related terms should not be given an "overly technical" construction, H.R. Rep. No. 120 *supra*, Pt. II, at 6 n.26, and stresses the need to "give both courts and litigants clear guidance on what is expected" and to avoid "unnecessary confusion" concerning when an application must be filed. *Id.* Pt. I, at 7. Similarly, the Senate Report broadly states that a prevailing party may file a fee petition within 30 days of "the final disposition of the case on the merits." S. Rep. No. 586 *supra*, at 16. The decision below is faithful to this congressional purpose because it refrains from giving the term "final judgment" an "overly technical" (and self-defeating) construction and furnishes "clear guidance," and because the Appeals Council's post-remand decision was "the final disposition of [petitioner's] case on the merits."

Furthermore, the result below is consistent with the congressional purpose to fix a definite time limitation on the filing of fee applications once all proceedings on the merits have terminated. A post-remand decision that the claimant declines to appeal to the next stage of the ad-

ministrative review process or (as here) to the courts effectively ends the underlying litigation and immediately enables the reviewing court to determine whether the claimant is a prevailing party and is otherwise entitled to fees under EAJA. A construction that would nonetheless make resolution of the attorney's fee issue contingent upon completion of additional (yet pointless) procedural steps in the district court would invite needless and potentially indefinite delay in the resolution of fee questions—a result that is plainly at odds with the 30-day time limit on fee applications that Congress prescribed.[19]

3. The Ninth Circuit's application of the 30-day filing requirement is strongly buttressed by this Court's decisions in *Hudson* and *Finkelstein*.

a. In *Hudson*, the Court held that in a Social Security case brought under 42 U.S.C. 405(g), the "civil action" for which attorney's fees may be awarded under 28 U.S.C. 2412(b)(1)(A) may include the proceedings before the Secretary following a remand from the district court. The Court relied on its past decisions under other fee-shifting statutes indicating that "where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded." 490 U.S. at 888; see also *id.* at 892 ("administrative proceedings may * * * be considered part of the 'civil action' for purposes of a fee award"). Accord, *Commissioner, INS* v. *Jean*, 110 S. Ct. at 2320-2321 (citing *Hudson*) (EAJA "favors treating a case as an integrated whole, rather than as atomized line-items").

As noted above, the operative language here requires a party to file his EAJA application "within thirty days of final judgment in the action." 28 U.S.C. 2412(d)

[19] For further discussion of the history of the 1985 Act, and particularly of the House committee report heavily relied on by petitioner (Br. 23), see pages 33-34, *infra*.

(1)(B). Since, as held in *Hudson*, the concept of the "civil action" in this setting may extend to the administrative proceedings following a remand by the district court, the "final judgment" in such a civil action similarly may consist of the decision of the Secretary that terminates those proceedings on remand. Specifically, where the Secretary's decision following the remand finds the claimant disabled (and the period for seeking judicial review under 42 U.S.C. 405(g) has lapsed), that decision is "final and not appealable" by either the claimant or the Secretary. See 28 U.S.C. 2412(d)(2)(G). Such a decision of the Secretary terminates not only the administrative proceedings themselves, but also the overall "civil action," of which those proceedings on remand are the last stage. In fact, a final, post-remand administrative decision that the claimant has chosen not to contest eliminates any basis for a continuing case or controversy in court, and thereby effectively moots the case. The decision of the Secretary therefore is properly regarded as the "final judgment in the [civil] action" that commences the running of the 30-day limitations period.

Significantly, the Court in *Hudson* explicitly rejected the Secretary's argument that because *Black's Law Dictionary* defines the term "action" to mean "a suit brought in a court," the "civil action" for which fees may be recovered under EAJA should not be construed to include fees for services rendered in administrative proceedings on remand from the court. See 490 U.S. at 891. The Court's rejection in *Hudson* of a narrow definition of "action" lends firm support to rejection of the narrow (and impractical) definition of "judgment" that is advanced by petitioner.

b. Petitioner's basic position—that there can be no "final judgment" terminating the civil action unless and until the district court takes some further action subsequent to the Secretary's final decision on remand—also is flatly inconsistent with *Finkelstein*. There, the Court held that in an action for judicial review pursuant to 42 U.S.C. 405(g), a district court order reversing the

Secretary's denial of benefits and remanding the case to the Secretary for further proceedings is a "final judgment" subject to immediate appeal by the Secretary under 28 U.S.C. 1291. The Court found in the structure of 42 U.S.C. 405(g) an indication that each final decision of the Secretary (*i.e.*, the first such decision and the decision rendered after remand) "will be reviewable in a separate piece of litigation." 110 S. Ct. at 2663. Accordingly, for purposes of Section 405(g) and 28 U.S.C. 1291, the district court's order remanding the case to the Secretary "terminated the civil action" challenging the Secretary's first decision denying benefits. *Id.* at 2664. Thus, there is nothing in the nature of a civil action for judicial review under 42 U.S.C. 405(g), or of a remand order entered at the conclusion of such an action, that requires the district court to do anything further after the remand.

c. In sum, *Hudson* held that "for purposes of the EAJA," the administrative proceedings after remand may be considered "part and parcel of the [civil] action for which fees may be awarded." 490 U.S. at 888. See *Finkelstein*, 110 S. Ct. at 2666. Nothing in this holding regarding the services for which fees may be awarded requires the *district court* to take any further action, after remand, to terminate the civil action on the merits. To the contrary, the Court made clear in *Finkelstein* that despite its prior holding in *Hudson*, the civil action was terminated, insofar as any substantive role of the district court was concerned, when it remanded the case to the Secretary. 110 S. Ct. at 2666-2667. Thus, *Hudson* and *Finkelstein* together contemplate that a "civil action" under 42 U.S.C. 405(g) extends (for purposes of EAJA) to the administrative proceedings on remand, but that the civil action, as so extended, terminates (for purposes of EAJA) if the Secretary renders a decision on remand that becomes "final and not appealable" by either party when the time for seeking further review expires. Contrary to petitioner's

contention (Br. 24-33), then, the decision below is fully consistent with both *Hudson* and *Finkelstein*.[20]

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[20] Even if petitioner were correct that the "judgment" to which EAJA refers must be a court order, it would not follow that petitioner's EAJA application was timely. As we have explained, because EAJA takes the statutory scheme under which the particular "civil action" arises as a given, EAJA does not require the district court to enter a post-remand order on the merits, which could then serve as a "judgment" for purposes of commencing the 30-day limitations period. Accordingly, some *other* order that was entered in the case, independently of EAJA, would have to serve as the "judgment" for these purposes. In our view, that "judgment" would be the order in which the court remanded the case to the Secretary; that order would become "final and not appealable" for purposes of commencing the 30-day limitations period under EAJA if, as in this case, the claimant declined to seek judicial review in a timely manner following completion of the administrative proceedings on remand. The reasons are as follows:

Under *Finkelstein*, the order remanding the case to the Secretary is a "judgment" that is "final" in the sense that the Secretary may take an immediate appeal under 28 U.S.C. 1291 (except in the category of special remands governed by the sixth sentence of 42 U.S.C. 405(g)). But if the remand goes forward, the question of the claimant's disability would again be before the district court if the claimant sought judicial review of the Secretary's post-remand decision. The district court's disposition of that second action for judicial review might in turn be appealed by either the Secretary or the claimant, depending upon who was aggrieved. Such a post-remand appeal might raise legal issues that were addressed by the district court at the time of the remand (to the extent those issues remain subsumed in the district court's post-remand disposition). In that event, the post-remand appeal would, in substance, constitute an appeal of the district court's order remanding the case to the Secretary. The district court's prior order remanding the case would remain "appealable" in this sense as long as it was possible that the case would return to the district court on the merits.

Under the foregoing analysis, if the claimant does not seek judicial review of the Secretary's post-remand decision within the 60-day period allowed by 42 U.S.C. 405(g), the possibility of any further judicial proceedings (including an appeal to the court of appeals) on the question of disability is terminated. At that point, the district court's prior order remanding the case to the Secretary would become "final and not appealable [to the court of appeals]" for purposes of EAJA, and the 30-day limitations period would begin to run. That, of course, is the same point at which the

4. a. In arguing at the petition stage that some further action by the district court is necessary to the existence of a "final judgment" under EAJA, petitioner relied (Pet. 5) on the sixth and seventh sentences of 42 U.S.C. 405(g).[21] Petitioner apparently was of the view that these provisions require the Secretary to file his decision on remand (as well as his findings and the additional record) with the district court in *every* case, and that the district court must then enter a judgment on the basis of that filing.

It is unclear whether petitioner renews this broad reading of the sixth and seventh sentences of Section 405(g) in his merits brief. See Br. 17-19, 31. In any event, the argument ignores the fact that, as *Finkelstein* held, the sixth and seventh sentences do not apply to all remands by the district court in cases under Section 405(g). They instead are concerned with a special category of cases: those in which the district court remands the case to the Secretary on the Secretary's motion made for good cause before he files his answer, or in which the district court orders that new evidence be taken before the Secretary, where the evidence is material and there is good cause for the failure to incorporate it in the record during the prior administrative proceedings. 110 S. Ct. at 2664-2665.[22] In those instances, it appears that

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30-day period begins to run under our principal submission herein, because the Secretary's post-remand decision also becomes "final and not appealable [to the district court]" if the claimant forgoes his opportunity to seek judicial review of that decision.

[21] These sentences provide, in pertinent part, that "the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. * * * Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision."

[22] The statute does not even refer to the latter procedure—ordering that new evidence be taken—as a "remand."

the case formally remains within the jurisdiction of the district court during the ancillary proceedings before the Secretary; but these special provisions are inapplicable to all other remands in civil actions under Section 405(g). For the same reason, petitioner errs in relying (Br. 25) on the passing reference in *Hudson* (490 U.S. at 887.) to the description of the sixth sentence of Section 405(g) in *Guthrie* v. *Schweiker*, 718 F.2d at 106. This Court subsequently recognized in *Finkelstein* that the sixth and seventh sentences have a far narrower scope, and it declined to follow the broader implications of the language in *Hudson*. See 110 S. Ct. at 2666-2667.

We therefore may put to one side petitioner's erroneous reliance on the sixth and seventh sentences of 42 U.S.C. 405(g) to support his contention that the Secretary is required by law to make a post-remand filing with the district court in *every* case, and that the district court must then enter an order affirming, modifying, or reversing the Secretary's post-remand decision. Yet if the post-remand obligations petitioner seeks to impose on the Secretary and the district courts are not compelled by Section 405(g), they are not compelled at all. Petitioner never comes to grips with this complete absence of any legal basis for the procedural framework he proposes.

b. Perhaps appreciating this central flaw in his position in the wake of *Finkelstein*, petitioner asserts (Br. 31-32) that the district court's remand order in this case in fact was entered pursuant to the sixth sentence of Section 405(g), and that the Secretary therefore was required to file his post-remand decision in this case with the district court, which could then have entered a "final judgment" affirming, modifying or reversing that decision. This argument is without merit.

Nothing in the district court's order in this case suggests that the remand was pursuant to the sixth sentence of Section 405(g): there is no indication that the remand was to be of only limited scope and that the district court was retaining jurisdiction with the intention of entering its final judgment on the merits at a later date,

after the Secretary filed modified findings and a new decision with the court. To the contrary, the court expressly styled its order a "judgment" and stated that "the matter is remanded to the Secretary *for all further proceedings*." J.A. 11 (emphasis added). The district court thus clearly contemplated that it was doing just what the district court did in *Finkelstein*: terminating all judicial proceedings on the merits of petitioner's claim for benefits and returning the matter entirely to the jurisdiction of the Secretary.

Contrary to petitioner's suggestion (Br. 31), the mere fact that the request for a remand might have been prompted by the development of new evidence of disability in connection with petitioner's second application does not mean that the remand was *pursuant* to the sixth sentence of Section 405(g) (which permits the court to order the Secretary to take new evidence). The district court's judgment did not cite the sixth sentence of Section 405(g), and the district court did not make the findings necessary for an order directing the receipt of evidence under the sixth sentence—namely, that the evidence is material and that there was a good cause for petitioner's failure to incorporate it in the record at an earlier date. Rather, the remand was a stipulated and final disposition of the case, much like one to which the parties might agree in any civil action.[23]

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[23] Petitioner errs in contending (Br. 31-32) that because the district court did not enter a judgment affirming, modifying, or reversing the Secretary's initial decision on the merits, and because the remand therefore was not a fourth sentence remand of the sort involved in *Finkelstein*, the court must have remanded the case pursuant to the sixth sentence of Section 405(g). Sentences four and six describe the consequences of remand orders entered in two particular types of situations that may arise in a case under 42 U.S.C. 405(g). They do not purport to state an exhaustive list of such situations. Cf. *Finkelstein*, 110 S. Ct. at 2662-2663. As we have explained, the sixth sentence prescribes a special procedure for utilizing the assistance of the agency in cases that remain before the district court. That is not what the district court did here; it finally disposed of the case, exercising its inherent authority

Furthermore, in light of the purposes of the sixth and seventh sentences (to assist the court in adjudication of a case over which it has retained jurisdiction), an order remanding a case to the Secretary for further proceedings ordinarily should be presumed not to have been entered pursuant to the sixth sentence unless the district court explicitly states otherwise, and therefore explicitly retains jurisdiction to rule on the merits. Cf. *Michigan* v. *Long*, 463 U.S. 1032, 1037-1044 (1983). That rule of construction would greatly simplify litigation in this area, especially since many remand orders, like the one in this case, are brief and are drafted without specific reference to particular provisions of Section 405(g). Such a rule of construction would also recognize modern realities, in which the Secretary finds the claimant disabled in a high percentage of cases after remand (thereby making it pointless for the court to reassume jurisdiction over the case), see note 13, *supra*, and in which the press of judicial business weighs against unnecessary adjudications by the courts following a remand. And such a rule would, in our view, comport with the usual expectations of the parties and the district court, all of whom typically intend the Secretary to assume full responsibility for any further adjudication.[24]

(independent of both sentences four and six) to remand the case to the Secretary "for all further proceedings." J.A. 11.

[24] There is much to commend the Ninth Circuit's approach even in a case remanded to the Secretary pursuant to the sixth sentence of Section 405(g). Sentences six and seven obviously were designed for situations in which a dispute regarding the claimant's eligibility remains after the proceedings before the Secretary are completed. Where the Secretary, after remand, renders a decision to which the claimant does not object, there is little point in filing the decision and transcript of proceedings with the district court or in requiring further action by the district court as a precondition to the filing of a fee application; in fact, the claimant's failure to object to the post-remand decision removes any basis for a continuing case or controversy in court. See *Richard* v. *Sullivan*, slip op. 6. Following the Ninth Circuit's approach in that setting also would have the virtue of uniformity, thereby eliminating the

C. The Fourth Circuit's Decision In *Guthrie v. Schweiker* And Cases Following It Do Not Warrant Rejection Of The Ninth Circuit's Approach In This Case

1. Despite the compelling support for the decision below in 42 U.S.C. 405(g), in EAJA, and in this Court's decisions in *Hudson* and *Finkelstein*, petitioner contends (Br. 16-20) that the Court should follow the approach suggested by *Guthrie* v. *Schweiker*, 718 F.2d 104 (4th Cir. 1983); *Brown* v. *Secretary of HHS*, 747 F.2d 878, 884-885 (3d Cir. 1984); and *Taylor* v. *Heckler*, 778 F.2d 674, 677 (11th Cir. 1985). All of those decisions, however, were rendered prior to *Hudson* and *Finkelstein* and rest on a seriously flawed view of the procedures for adjudication of Social Security claims.

The Fourth Circuit in *Guthrie* relied on three premises in holding that the Secretary should file his new decision on remand with the district court, that the district court should then enter a judgment on the basis of that decision, and that the district court judgment would trigger the 30-day period for filing a fee application under EAJA. Each of those premises has since been shown to be erroneous. First, the Fourth Circuit believed, contrary to the subsequent decision in *Finkelstein*, that a remand order cannot be a final decision that terminates proceedings in the district court and that is subject to immediate appeal. 718 F.2d at 106. Second, in concluding that the Appeals Council decision on remand cannot be a "final judgment" that commences the 30-day period for filing an EAJA application, the Fourth Circuit relied on its view that "EAJA draws a clear distinction between final administrative actions and final judicial actions," *Ibid.*

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need to distinguish between different kinds of remands in construing sometimes ambiguous district court orders. This case, however, presents no occasion for determining whether the 30-day limitations period for filing an EAJA application might, in appropriate circumstances, commence with the rendering of an administrative decision following a remand under the sixth sentence of Section 405(g), or whether the Secretary could promulgate new procedures providing for such treatment of sentence six remands.

(comparing 5 U.S.C. 504(a)(2) with 28 U.S.C. 2412 (d)(1)(B)). That rationale is inconsistent with the subsequent decision in *Hudson*, where the Court rejected the Secretary's similar argument (likewise based on a comparison between 5 U.S.C. 504 and 28 U.S.C. 2412) that the administrative proceedings on remand are wholly distinct from the "civil action" for purposes of EAJA. 490 U.S. 890-892. Third, as noted above, *Guthrie* expressly relied on the language in the sixth sentence of Section 405(g) requiring the Secretary to file his new decision on remand with the district court (718 F.2d at 106); *Finkelstein* held, contrary to the Fourth Circuit's apparent belief, that this provision applies *only* to sixth sentence remands. 110 S. Ct. at 2664.[25]

In *Brown*, the Third Circuit, citing *Guthrie* and likewise relying on the sixth sentence of Section 405(g), stated in dictum that at least where the claimant requests the district court at the time of remand to retain jurisdiction to award fees (which petitioner did not do here), the Secretary should file his new decision on remand with the district court and the district court may then affirm, modify, or reverse that decision; the district court's order in turn could constitute the requisite "final judgment" triggering the 30-day EAJA filing period. 747 F.2d at 884-885. This analysis, like that in *Guthrie*, does not survive *Finkelstein*.[26]

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[25] Moreover, as the Court indicated in *Finkelstein*, *Guthrie* itself may have involved a sixth-sentence remand. 110 S. Ct. at 2666 n.8.

[26] In *Brown*, the roles of the Secretary and the claimant were reversed: citing the sixth sentence of Section 405(g), the Secretary represented that he would in all cases file the post-remand decision with the district court, which could then enter an order that would constitute the "final judgment" for EAJA purposes; and the claimant argued that Section 405(g) required such a procedure only in the limited category of cases covered by sentence six of Section 405(g). 747 F.2d at 884. With the case in this posture, the Third Circuit did not independently conclude that Section 405(g) required such filings; it deferred to the Secretary's representation. See *Buck* v. *Secretary of HHS*, slip op. 10 n.5. *Finkelstein* of course has eliminated any basis for the notion that the Secretary is legally

In *Taylor*, the claimant moved to dismiss the action in court after he prevailed before the Secretary on remand, and the district court granted that motion. The Eleventh Circuit held that the EAJA filing period commenced with the order of dismissal, reasoning that a district court order remanding a case to the Secretary is not a final judgment subject to immediate appeal; that because the remand order is interlocutory, the district court retains jurisdiction during administrative proceedings on remand; that the district court therefore must enter an order at a later date to terminate its jurisdiction; and that such an order is the "final judgment" that commences the 30-day limitations period for filing an EAJA application. 778 F.2d at 677-678 & n.2. The essential premise in this chain of reasoning—that a remand order is not appealable—was later held erroneous in *Finkelstein*.

In short, all of the decisions on which petitioner relies rest on premises since shown by *Hudson* and *Finkelstein* to have been erroneous.[27] The Court therefore should follow the post-*Hudson* and *Finkelstein* rulings exemplified by the decision below.

2. For similar reasons, petitioner's reliance (Br. 23) on the reference to *Guthrie* in the House Report on the 1985 amendments to EAJA is misplaced. See H.R. Rep. No. 120, *supra*, at 19-20. That reference was in a part of the Report that discussed Section 3 of the 1985 amendments, 28 U.S.C. 2412 note, and that addressed the interaction of EAJA and the special provision in the Social Security Act, 42 U.S.C. 406(b), for payment of attorney's fees out of the claimant's past-due benefits. As part of the background for that discussion, the Report described how some courts had resolved EAJA issues in the Social Security context. The Report noted that a claimant ordinarily had not been regarded as a "prevail-

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required to make post-remand filings with the district courts. (The form appended to petitioner's brief, which states that the papers will be furnished to the U.S. Attorney for filing (Pet. Br. App. 2a), was developed prior to *Finkelstein*.)

For similar reasons, petitioner's quotation (Br. 29-30, 44-45) of statements in our briefs in *Hudson* and *Finkelstein* that it would be appropriate for the Secretary to file the post-remand decision of the Secretary with the district court, in order to facilitate the award of EAJA fees, is not a basis for concluding here that the Secretary is *required* to follow that practice. As explained in the text, we believe that such a practice creates unnecessary delay and paperwork. In light of *Finkelstein*, if the Court affirms the Ninth Circuit's decision in this case, the Secretary does not propose to continue the practice of making such post-remand filings as a general matter.

[27] In *Myers* v. *Sullivan*, 916 F.2d 659 (11th Cir. 1990) (see Pet. Br. 25, 32-33), which was a consolidated opinion rendered in four individual cases, the Secretary's decision on remand in fact was filed with the district court, and the district court then entered an order disposing of the case. The court of appeals held that, even though the district court in each case sustained the Secretary's decision on remand (and even though the Secretary therefore would be unlikely to appeal such an order), the orders did not become "final judgments" that commenced the 30-day period for filing an EAJA application until there was some affirmative indication that the Secretary would not appeal. In the court's view, that ordinarily would be only after the 60-day period for filing a notice of appeal under Fed. R. Civ. P. 4 had expired, unless there was some earlier, definitive statement by the Secretary disavowing appeal. 916 F.2d at 671-672.

Because the administrative decisions on remand in *Myers* had been filed with the district court and the district court then entered an order disposing of each case, the Eleventh Circuit had no occasion to consider whether the Secretary's fully favorable decision on remand would have qualified as a "final judgment." The Eleventh Circuit did, however, describe the practice under *Guthrie*, *Brown* and its own decision in *Taylor* as reflecting rules that, "[u]ntil recently," had governed Social Security cases. 916 F.2d at 672-673. Especially in light of the belief expressed elsewhere in the *Myers* opinion that *Finkelstein* had worked a substantial change in governing principles (*id.* at 677-678; but see page 48, *infra*), the implication of the Eleventh Circuit's observation is that the rules of *Guthrie*, *Brown* and *Taylor* no longer obtain. The court also stressed that the term "final judgment" is not to be given a rigid, overly technical interpretation. *Id.* at 670-671.

ing party" solely by virtue of obtaining a remand to the Secretary. *Id.* at 19. It then stated that *Guthrie* had "pointed to the provision of 42 U.S.C. 405(g) providing that after the HHS review upon remand the agency must file its findings with the reviewing court." *Ibid.* The Report continued: "Thus the remand decision is not a 'final judgment,' nor is the agency decision after remand"; "[i]nstead, the District Court should enter an order affirming, modifying or reversing the final HHS decision, and this will usually be the final judgment that starts the 30 days running." *Ibid.*

As the Court noted in *Finkelstein* (110 S. Ct. at 2665-2666 n.8), this 1985 Report on EAJA sheds no light on the interpretation of Section 405(g) as originally enacted in 1939, and its discussion of the procedures required by Section 405(g) was mistaken. The Report therefore sheds little light on whether, once those essential but mistaken premises are put to one side, the Secretary's decision on remand may properly be regarded as the "final judgment" for puprposes of commencing the 30-day limitations period for seeking EAJA fees—especially in view of the subsequent holdings in *Hudson* (that the proceedings on remand are part of the civil action for purposes of EAJA), and in *Finkelstein* (that a remand order terminates the proceedings in the district court).[28]

D. The Approach We Propose Is More Practical, And More Helpful To Claimants, Than Any Suggested Alternative

Petitioner contends (Br. 33-40) that the construction of the EAJA we propose would be "utterly unworkable." Petitioner is simply wrong. The courts of appeals that have examined the question after *Hudson* and *Finkelstein* have concluded that this rule makes the most prac-

[28] Moreover, as we have explained (see pages 20-22, *supra*), our submission is also supported by other aspects of the legislative history of the 1985 amendments.

tical sense. We think that is especially so if, as we suggest (see pages 35-38, *infra*), the 30-day filing period uniformly begins to run at the end of the time during which the claimant could have sought further review under applicable statutory and regulatory provisions.

As we have explained, this approach has a number of practical virtues. First, it commences the 30-day limitations period at the time when the proceedings *are* over as a practical matter. Second, it properly places the burden on the person seeking further relief—the claimant—to take the initiative by filing an application for attorney's fees. Third, it saves the Secretary the burden of filing anything further in court, and saves the court the burden of receiving and acting upon such filings, in those cases in which the claimant may never seek attorney's fees. Fourth, it makes attorney's fees promptly available by allowing the claimant to seek them on his own initiative. Under the rule petitioner proposes, by contrast, the district court could do nothing unless and until there had been a filing with the court of the decision on remand and the court had entered some sort of (superfluous) order on the merits.

Petitioner's practical objections to our proposed approach are without merit.

1. As an initial matter, a number of petitioner's objections are tied to one aspect of the Ninth Circuit's analysis in this case with which, on reflection, we disagree. The narrow area of our disagreement with the Ninth Circuit, however, does not in any way undermine the correctness of the judgment below.

In our view, a post-remand decision of the Secretary should be deemed "final and not appealable," for purposes of EAJA, when the time for seeking review of that decision has expired. That should be so, we believe, whether the post-remand decision is regarded as fully favorable to the claimant (as the Appeals Council's May 7, 1985, decision clearly was in this case), or only partially favorable to the claimant (as would be true, for example, if the post-remand decision in this case had

found the claimant to be disabled for only part of the period covered by his application), or indeed not favorable at all. The court of appeals seemed to agree that as a general rule, an administrative decision is not final and unreviewable until after the time for seeking review of that decision has expired. But it carved out an exception to that general rule for this and like cases, on the ground that where the post-remand decision is fully favorable, the claimant would have no reason to seek further review. See J.A. 32-33.

As we read the definition of the term "final judgment" in 28 U.S.C. 2412(d)(2)(G), whether a particular decision is "final and not appealable" should turn solely on whether the time within which to appeal the particular order has expired, not on whether the claimant might have an interest or stake in appealing the order. Although the phrase "not appealable," standing alone, might carry either connotation, when it is coupled with the term "final," the sense of paragraph (G) as a whole is that it defines a "final judgment" in temporal (not standing) terms. That interpretation also is consistent with the purpose of the definition of "final judgment," which is to identify the *time* within which an application for fees must be filed.

Moreover, this construction of paragraph (G) is confirmed by its legislative history. Paragraph (G) was added to 28 U.S.C. 2412(d)(2) in 1985 to resolve a conflict in the lower courts on the question whether a "judgment" was to be regarded as "final" for EAJA purposes when it was entered, or only when the period for taking an appeal from that judgment had lapsed. See pages 20-22, *supra*. Paragraph (G) was expressly intended to ratify and codify the latter approach. See H.R. Rep. No. 120, 99th Cong., 1st Sess. 14 (1985) (amendments adopt interpretation that judgment is final "when the time to appeal has run"); *id.* at 18 n.26 ("if the Government does not appeal an adverse decision, the thirty-day period would begin to run upon expiration of the time for filing a notice of appeal or a

petition for certiorari");[29] *id.* Pet. II, at 6 & n.26 (same); S. Rep. No. 586, 98th Cong., 2d Sess. 16 (1984) (fee petition must be filed within 30 days of "when a party's right to appeal the order has lapsed"). This construction of the term "final judgment" (as defined in paragraph (G)) also makes practical sense. It results in a uniform, easily applied rule for all administrative and judicial orders—a rule that requires reference only to the time limits for seeking further review under the particular statutory and regulatory scheme. By the same token, this construction avoids the need for post hoc evaluation of a particular order to determine whether a claimant could have sought review or would have had any interest in doing so.

Thus, in the present context, a post-remand decision by the Secretary that the claimant allows to become "final and not appealable" by failing to seek further administrative or judicial review within the allotted time is the "final judgment" in the action for purposes of triggering the 30-day limitations period under EAJA. In the paritcular circumstances of this case, the difference between the foregoing rule and the one adopted by the Ninth Circuit does not affect the outcome. Since petitioner never sought judicial review of the Appeals Council's May 7, 1985, post-remand decision, that decision became "final and not appealable" for purposes of EAJA 65 days later (on July 11, 1985). Petitioner then had 30 days (until August 10, 1985) within which to file an EAJA application. But petitioner did not file his EAJA application until May 16, 1986. That was over nine months late. Accordingly, under the rule we propose, as well as under the exception to that rule fashioned by the Ninth Circuit for cases such as this,

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[29] The House Report stated (at 18 n.26) in a closely analogous context: "In a case remanded by a court of appeals for entry of judgment, the time deadlines would commence on expiration of the time for appealing the judgment on remand."

the judgment below ordering dismissal of petitioner's EAJA application as untimely is correct.[30]

2. Against this background, each of petitioner's supposed "practical" objections is insubstantial.

a. Petitioner first argues (Pet. 34-38) that the decision below would "create havoc" in cases in which the claimant seeks attorney's fees from the United States under EAJA and also seeks, under 42 U.S.C. 406(b), to have the court allow an attorney's fee not exceeding

[30] At the time of the post-remand administrative proceedings in this case, governing regulations provided that a case remanded by a district court would remain within the jurisdiction of the Appeals Council. If an evidentiary hearing was required, or if circumstances otherwise warranted, the Appeals Council could refer the case to an ALJ to conduct further proceedings and make a recommended decision. The Appeals Council, however, would render the Secretary's decision on remand. See 20 C.F.R. 404.983 (1985) (Title II); *id.* 416.1483 (SSI). If the claimant was dissatisfied with the Appeals Council decision, he could then could return to court to challenge it.

In September 1989, the Secretary published new regulations adopting different procedures for cases remanded by a district court. 54 Fed. Reg. 37,789. Under the revised procedures, the Appeals Council will ordinarily remand such a case to an ALJ, who can render his own decision rather than preparing a recommended decision for the Appeals Council. The claimant then may file exceptions to the ALJ's decision with the Appeals Council within 30 days, and the Appeals Council may assume jurisdiction on its own motion within 60 days. 20 C.F.R. 404.983 and 404.984, 416.1483 and 416.1484. If the Appeals Council takes jurisdiction (on the basis of exceptions or on its own motion), the Appeals Council's new decision "becomes the final decision of the Secretary after remand." 20 C.F.R. 404.984(b)(3), 416.1484(b)(3). If the claimant does not file exceptions within 30 days and the Appeals Council does not assume jurisdiction within 60 days, the decision of the ALJ "becomes the final decision of the Secretary after remand." 20 C.F.R. 404.984(d), 416.1484(d). *Finkelstein* makes clear that the Secretary's final post-remand decision is then reviewable "in a separate piece of litigation," 110 S. Ct. at 2663, pursuant, once again, to 42 U.S.C. 405(g). Thus, by virtue of the 60-day limitation on judicial review under Section 405(g), the claimant would have 60 days within which to seek judicial review of whatever decision is, under these regulations, "the final decision of the Secretary after remand."

25% of (and to be paid out of) the "past-due benefits to which the claimant is entitled by reason of such judgment." This contention is without merit for several reasons.

As an initial matter, as petitioner elsewhere concedes (Br. 47), Section 406(b) applies only in Title II cases. It therefore is inapplicable to this case, which arises solely under the SSI program established by Title XVI of the Act. See *Bowen* v. *Galbreath*, 485 U.S. 74 (1988). Moreover, even in cases arising under Title II, there is no inconsistency. Contrary to petitioner's assertion (Br. 36), Section 406(b) has not been construed to require the district court either to award attorney's fees as part of the judgment itself, or to enter a "judgment" following completion of administrative proceedings on remand as a prerequisite to entertaining an application for fees for services performed by the attorney in court prior to the remand.[31] Accordingly, the established practice under Section 406(b) in fact strongly supports our position that entry of a subsequent "judgment" by the district

[31] Numerous appellate decisions have addressed the availability of fees under 42 U.S.C. 406(b) where no such steps were taken. See, *e.g.*, *Gardner* v. *Melendez*, 373 F.2d 488, 490 (1st Cir. 1967); *Rodriguez* v. *Secretary of HHS*, 856 F.2d 338, 339 (1st Cir. 1988); *Conner* v. *Gardner*, 381 F.2d 497 (4th Cir. 1967); *Ray* v. *Gardner*, 387 F.2d 162 (4th Cir. 1967); *Brown* v. *Gardner*, 387 F.2d 345 (4th Cir. 1967); *Morris* v. *SSA*, 689 F.2d 495 (4th Cir. 1982); *Whitehead* v. *Richardson*, 446 F.2d 126, 128 (6th Cir. 1971); *Webb* v. *Richardson*, 472 F.2d 529, 534-535 (6th Cir. 1972); *Jankovich* v. *Bowen*, 868 F.2d 867, 869 (6th Cir. 1989); *Smith* v. *Bowen*, 815 F.2d 1152 (7th Cir. 1987); *Fenix* v. *Finch*, 436 F.2d 831, 834-835 (8th Cir. 1971); *Burnett* v. *Heckler*, 756 F.2d 621, 624 (8th Cir. 1985); *MacDonald* v. *Weinberger*, 512 F.2d 144, 145-146 (9th Cir. 1975); *Straw* v. *Bowen*, 866 F.2d 1167, 1169 (9th Cir. 1989); see also R. Francis, *Social Security Disability Claims: Practice & Procedure* § 5.22, at 25 (1983) (stating that fee petition must be filed with court if claimant prevails on remand, without mentioning any requirement of a new judgment); J. Glenn, *et al.*, *Social Security: Law & Practice* § 49.7, at 13 (1983 & Supp. 1990) (remand order is favorable judgment permitting award of fees, at least where claimant receives subsequent award by the Secretary).

court likewise is not required by Section 405(g) or EAJA. In addition, experience shows that the filing and review of fee applications under EAJA and Section 406(b) can and has been closely coordinated in practice. See R. Francis, *Social Security Disability Claims: Practice and Procedure* § 5:34, at 39-40 (1983 & Supp. 1990); Note, 58 Ford. L. Rev. at 1285-1286; *Jankovich* v. *Bowen*, 868 F.2d 867 (6th Cir. 1989). Indeed, Section 3 of the 1985 EAJA amendments, 28 U.S.C. 2412 note, expressly contemplates that result, since it requires an offset of the two awards to prevent a double recovery.

b. Petitioner next complains (Br. 38) that, under the Ninth Circuit's reasoning, "EAJA petitions will have to be filed before all the work on the case is completed." Petitioner points out that after the claimant is found to be disabled, SSA then must determine whether the claimant satisfies the non-disability eligibility requirements and, if so, the amount (if any) of benefits to which the claimant is entitled. Petitioner contends that any work a lawyer performs in this process following a court remand is compensable under EAJA because it is " 'necessary . . . to the ultimate vindication of the claimant's rights' " (Br. 38 (quoting *Sullivan* v. *Hudson*, 490 U.S. at 890)), but that if an administrative decision that has become final and not appealable triggers the running of the 30-day limitations period for filing an EAJA application, a lawyer might have to file his EAJA application before that work is completed. As a consequence, the lawyer would be required either to forgo fees for that additional work or to amend his prior EAJA application.

There are several significant problems with this analysis. First, the determination of the amount (if any) of SSI benefits to which a claimant is entitled is separate from the determination of whether the claimant is disabled. It is therefore separately subject to review under the multi-step administrative appeals process in 20 C.F.R. Pt. 416, Subpt. N (reconsideration, ALJ hearing, and Appeals Council review) that was available to the claimant to challenge the determination that he was not

disabled (see 20 C.F.R. 416.1401, 416.1402(a) and (j); see also 20 C.F.R. 404.901, 404.902(a) and (c) (similar provisions under Title II program))—and, if necessary, to judicial review under 42 U.S.C. 405(g).[32] Accordingly, issues concerning benefit amounts and payment are distinct from the issues that were before the court in the civil action for judicial review of the Secretary's decision finding the claimant not disabled. See Note, 58 Ford. L. Rev. at 1282-1283. Thus, an attorney's work on those issues is not necessary to the vindication of the rights addressed by the district court's decision on the question of disability, and the rationale of *Hudson* does not extend to such services.

Second, even if such services were compensable under EAJA, the approach we suggest would not cause substantial difficulties. Contrary to petitioner's view, the computation of benefits will in many cases be completed within 30 days of the favorable decision—or, at least, all necessary work by the attorney in that process will have been completed within that period.[33] Moreover, this objection by petitioner (like most of his others) rests on the premise that an administrative decision that is fully favorable to the claimant is, upon issuance, a "final judgment" that triggers the running of the 30-day limitations period. Under the approach we propose, however, the 30-day EAJA period does not begin to run until after expiration of the 60-day period for seeking further review. As a result, there will be at least 90 days before the EAJA application must be filed. Presumably, the

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[32] In this case, petitioner did not seek further administrative review or judicial review of the initial determination of the amount of benefits to which he was found to be entitled under his first application, J.A. 25-26, and that determination therefore became final and binding. See 20 C.F.R. 416.1405.

[33] As petitioner points out (Br. 36 n.8), the standard notice to claimants states that ordinarily the amount of benefits will be resolved within 60 days of the date the decision is rendered. See Pet. Br. App. 1a.

computation of the amount of benefits would be completed within that period in virtually all cases.[34]

Finally, even if an attorney's work in the computation-of-benefits process were covered by EAJA after a remand on the issue of disability—and even if a rare case arose in which the attorney's work in that process were not completed within 90 days—we see no reason why the claimant could not file his EAJA application and then amend it when the computation process was completed.

c. Petitioner contends (Br. 38-39) that the administrative review process is a "highly informal one" in which it "is often difficult, if not impossible, to flag the finality of a decision for EAJA purposes." This assertion is without merit. Under the rule we propose, the post-remand decision of the Secretary becomes "final and not appealable" if the claimant does not seek further administrative or judicial review within the time allowed by the governing statute and regulations. The claimant then knows that to avoid such finality, he must seek further review.[35]

d. Petitioner contends (Br. 39-40) that the claimant, not the Secretary, is the one to decide whether an administrative decision on remand is fully favorable. We agree, and the approach we propose accommodates that point. If the claimant does not believe the decision is fully favorable, he may seek further review within the available time. Once the claimant has elected to forgo his right to seek further review, the EAJA limitations period commences.

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[34] We have been informed by the Department of Health and Human Services that in fiscal year 1990, the average time required for the computation of benefits in Title II cases was 24 days. The Department does not have comparable statistics concerning SSI cases. Those cases might take longer to determine.

[35] The affidavits attached to petitioner's rehearing petition in the court of appeals, cited by petitioner (Br. 39), recounted three attorneys' experience in the limited context of whether attorneys receive copies of award certificates. As we have explained (see pages 40-41, *supra*), the award and payment process is distinct from the adjudication of disability.

e. Petitioner's contention (Br. 40) that the judgment below should be reversed to prevent other agencies from adopting similar principles governing the finality of their decisions on remand is wholly without merit. Contrary to petitioner's implicit suggestion, it is a virtue of the decision below that it provides for finality at the completion of the post-remand administrative process for purposes of *both* EAJA and the merits. Under the approach we urge, in other words, a post-remand decision will be deemed a final judgment for EAJA purposes only when it has become final and not appealable on the merits, under the statutory and regulatory provisions that govern administrative and judicial review under the particular program at issue. There will be, accordingly, a readily available benchmark under each program for determining when the 30-day limitations period for filing an EAJA application begins to run.

II. THERE ARE NO GROUNDS FOR THIS COURT TO EXEMPT PETITIONER FROM THE REQUIREMENT THAT AN EAJA APPLICATION BE FILED WITHIN 30 DAYS OF A POST-REMAND DECISION BY THE SECRETARY THAT HAS BECOME FINAL AND NOT APPEALABLE

Petitioner contends (Br. 40-48) that if the Court upholds the Ninth Circuit's ruling, "it should not be applied retroactively" (Br. 40) to render his EAJA application untimely. There are several problems with this argument.

First, the Ninth Circuit's ruling on the question of when an EAJA application must be filed was rendered in this very case, and now petitioner has asked this Court to do the same thing. If the Court rejects petitioner's argument and agrees with our submission, it necessarily will hold that the EAJA application filed by petitioner in this case was untimely. Thus, this is not a typical case presenting a question of the "retroactive" application of a judicial decision, and the circumstances would not in any event excuse petitioner's nine-month

delay in applying for fees. Whether the Ninth Circuit's (or this Court's) ruling here should be applied to *other* cases now pending in the Ninth Circuit (or other circuits) in which the Secretary's post-remand decision became final and unreviewable before the date of the Ninth Circuit's (or this Court's) ruling is a question that may properly be left to the lower courts in the first instance.[36] That is especially so since the Ninth Circuit did not address the question of retroactivity in the decision below, and since no court of appeals has addressed the impact of this Court's intervening decision in *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453 (1990), discussed below, in this setting. For these reasons, and because the retroactivity question might turn in large measure on whether there was controlling precedent in a particular circuit, the Court may wish to have that question in this case considered by the Ninth Circuit in the first instance.

Furthermore, as petitioner concedes, a court may not in any event decline to give retroactive effect to a jurisdictional ruling. See Br. 41 (citing *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379-380 (1981)). The Ninth Circuit in this case held that the 30-day filing period under 28 U.S.C. 2412(d)(2)(B) is jurisdictional. J.A. 29-30 (citing *Papazian* v. *Bowen*, 856 F.2d 1455, 1455-1456 (9th Cir. 1988), and *Barry* v. *Bowen*, 825 F.2d 1324, 1327-1329 (9th Cir. 1987)). Other courts of appeals have reached the same conclusion.[37]

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[36] Several such cases are now pending on appeal in the Ninth Circuit, but the appeals have been stayed pending the Court's decision in this case.

[37] *American Ass'n of Retired Persons* v. *EEOC*, 873 F.2d 402, n.7 (D.C. Cir. 1989); *Dunn* v. *United States*, 775 F.2d 99, 103 (3d Cir. 1985); *Allen* v. *Secretary of HHS*, 781 F.2d 92, 94 (6th Cir. 1986); *Jabbay* v. *Sullivan*, 920 F.2d 472, 473 (7th Cir. 1990); *Olson* v. *Norman*, 830 F.2d 811, 821 (8th Cir. 1987); *Myers* v. *Sullivan*, 916 F.2d 659, 666 (11th Cir. 1990); *United States* v. *J.H.T. Inc.*, 872 F.2d 373, 375 (11th Cir. 1989); *Haitian Refugee Center* v. *Meese*, 791 F.2d 1489, 1494 (11th Cir. 1986); *Beta Systems, Inc.* v. *United States*, 866 F.2d 1404, 1405 (Fed. Cir. 1989); *J.M.T. Mach. Co.* v. *United States*, 826 F.2d 1042, 1046-1047 (Fed. Cir. 1987); see also cases cited in note 40, *infra*; cf. *Howitt* v. *U.S. Dep't of Commerce*, 897 F.2d 583, 584 (1st Cir. 1990) (5 U.S.C. 504(c)(2)); *Long Island Radio Co.* v. *NLRB*, 841 F.2d 474, 477-478 (2d Cir. 1988) (5 U.S.C. 504(a)(2)); see generally Note, 58 Ford. L. Rev. at 1273 & n.27.

Petitioner contends (Br. 41-42) that under *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453 (1990), the 30-day filing period should now not be regarded as jurisdictional in nature—even though petitioner apparently concedes (Br. 41) that it *was* so regarded at the time of the events giving rise to these proceedings on petitioner's fee application. In *Irwin*, the Court held that 42 U.S.C. 2000e-16(c), which allows a federal employee to file a Title VII action in district court within 30 days of the administrative decision, is not jurisdictional, but rather is subject to equitable tolling in appropriate circumstances. 111 S. Ct. at 456-457. The Court recognized that it previously had construed the six-year limitations period under 28 U.S.C. 2501 (applicable to suits in the then-Court of Claims) as stating a jurisdictional bar to suits not filed within that period. 111 S. Ct. at 457 (citing *Soriano* v. *United States*, 352 U.S. 270, 273 (1957)). But the Court in *Irwin* chose to state a "more general rule" that once Congress has waived the Government's sovereign immunity, "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 111 S. Ct. at 457. Thus, contrary to petitioner's suggestion (Br. 41-42), the Court stated only a rebuttable presumption, not an absolute rule applicable to all statutes prescribing time limits for filing suits against the Government.[38]

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[38] The Court did not expressly overrule *Soriano*, although it said that it was not persuaded that the difference between the language of 28 U.S.C. 2501, at issue there, and 42 U.S.C. 2000e-16(c) was enough to manifest a different congressional intent with respect to the availability of equitable tolling. 111 S. Ct. at 457; but see *id.* at 549 (White, J., dissenting) (stating that the Court "directly overrules" *Soriano*).

Here, the text of 28 U.S.C. 2412(d)(1)(B) is written in mandatory terms (a party "shall" file an application within 30 days of judgment), and the legislative history of EAJA shows that the 30-day filing period was understood to be jurisdictional in nature. For example, the Senate Report on the bill ultimately enacted as the 1985 EAJA amendments explained that the issue of when a "judgment" is deemed "final" under 28 U.S.C. 2412(d)(2)(B) "is important since the thirty-day deadline for filing the fee application is jurisdictional and cannot be waived." S. Rep. No. 856, *supra*, at 16;[39] cf. H.R. Rep. No. 120, *supra*, at 7 (issue important because fee petitions "must be filed" within 30 days); H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 26 (1980) (EAJA "requires" filing within 30 days) H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18 (1980) (party "must apply" within 30 days). See generally *Action on Smoking & Health* v. *CAB*, 724 F.2d 211, 225-226 (D.C. Cir. 1984). Furthermore, when Congress amended EAJA in 1985, a

[39] See also *Equal Access to Justice Act Amendments: Hearing on H.R. 5059 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 38 (1984) (Dep'ty Ass't Att'y Gen'l Kuhl) (when "final judgment" occurs is important because the "thirty-day deadline for filing the application is jurisdictional and cannot be waived"); *Reauthorization of Equal Access to Justice Act: Hearing Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 32 (1983) (statement of Ass't Att'y Gen'l McGrath) ("thirty-day deadline for filing the application is jurisdictional and cannot be waived by the government or even the court"); *id.* at 75 (quoting Small Business Legal Defense Committee & D. Stewart, "The Equal Access to Justice Act: An Attorney's Handbook") ("it has been held that the 30-day requirement from time of final judgment is jurisdictional and may not be waived"); *Implementation of the Equal Access to Justice Act: Oversight Hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 3, 5 (1982) (Ass't Att'y Gen'l McGrath ("jurisdictional and cannot be waived"); *Equal Access to Justice: Hearing Before the Subcomm. on Agency Admin. of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 14 (1987) (same).

number of courts of appeals had already held that its filing periods are jurisdictional,[40] which reinforces the specific support for that rule in the legislative history. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 379-382 (1982).

Even if equitable tolling and a prospective-only ruling were not absolutely foreclosed in this context on jurisdictional grounds, there is no warrant for excusing petitioner's delay in this case. The appellate decisions cited by petitioner (Br. 42) as having suggested a contrary rule—the Fourth Circuit's decision in *Guthrie* and the Third Circuit's decision in *Brown*—were not binding on the District Court for the Central District of California. This is therefore not a case, like *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 107 (1971), and *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604, 608-609 (1987), where the court of appeals overruled established circuit precedent. See also *American Trucking Ass'ns* v. *Smith*, 110 S. Ct. 2323, 2332 (1990) (plurality opinion); compare *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 662-663 (1987). Moreover, *Guthrie* and *Brown* were decided before the 1985 amendments to the statutory scheme made it clear that the term "final judgment" for purposes of EAJA departs substantially from its meaning in the specific context of judicial proceedings.[41] In addition, the text of 42 U.S.C. 405(g) furnished adequate notice

[40] See *Action on Smoking & Health* v. *CAB*, 724 F.2d 211, 225 (D.C. Cir. 1984); *Premachametra* v. *Mitts*, 753 F.2d 635, 642 n.10 (8th Cir. 1985) *Clifton* v. *Heckler*, 755 F.2d 1138, 1144-1145 (5th Cir. 1985); see also *Monark Boat Co.* v. *NLRB*, 708 F.2d 1322, 1326-1327 (8th Cir. 1983) (5 U.S.C. 504(a)(2)); *Columbia Mfg. Co.* v. *NLRB*, 715 F.2d 1409, 1410 (9th Cir. 1983) (5 U.S.C. 504(c)(2)).

[41] In *Taylor*, the Eleventh Circuit—relying on the explicit terms of 42 U.S.C. 405(g) that this Court later found controlling in *Finkelstein*—questioned an important premise on which *Guthrie*, *Brown* and *Taylor* itself rested: that a remand order is not appealable. 778 F.2d at 676-677; see *Buck* v. *Secretary of HHS*, slip op. 10 n.5. *Taylor* therefore undermined any reliance petitioner might have placed on those decisions.

to petitioner that (in cases not governed by the sixth sentence), the Secretary was not required to file his decision on remand with the district court and the district court was not required to enter a post-remand judgment. And the position accepted by this Court in *Finkelstein*—that remand orders are appealable—had been widely accepted in many previous appellate decisions. See Gov't *Finkelstein* Br. ~~15-17~~. In these circumstances, even acknowledging the existence of some uncertainty, petitioner cannot claim unfair surprise.

Nor would a prospective-only application of the decision below be necessary to effectuate the purposes of EAJA. See *Chevron*, 404 U.S. at 107. The overriding purpose of EAJA is to remove a potential obstacle to obtaining the services of counsel in challenging governmental action. See *Commissioner, INS* v. *Jean*, 110 S. Ct. at 2322 & n.14 (quoting legislative history). When the question presented by this case arises, the claimants have, by definition, obtained the assistance of counsel that EAJA was intended to promote. A prospective ruling that excused certain existing claimants and their counsel from considerable delay in filing a fee application therefore is not necessary to create an incentive for those claimants to obtain counsel.

Finally, retroactivity would not produce substantially unfair results, *Chevron*, 404 U.S. at 107-108, especially in the circumstances of this case. In *Irwin* itself, the Court noted that equitable relief from limitations periods has been confined to situations in which the claimant has "actively pursued his judicial remedies," and has not been extended to situations "where the claimant failed to exercise due diligence in preserving his legal rights." 111 S. Ct. at 457-458. Petitioner would not be eligible for relief under these principles, because he did not file an application for fees for more than a year after the Appeals Council decision. Cf. *White* v. *New Hampshire Dep't of Employment Services*, 455 U.S. 445, 454-455 (1982) (noting that district courts have discretion to deny applications for attorney's fees and costs on

grounds of tardiness).[42] Nor is there any indication that he ever sought to effectuate either a filing with the district court or the entry of an order by the district court on the merits—the events that he now claims were necessary to enable the district court to award fees. In fact, even when petitioner eventually did file a fee application, he did not request the district court to enter an order affirming the Secretary's post-remand decision. As a result, there is no indication that petitioner in fact relied on the applicability of the procedural requirements he now urges,[43] and therefore no indication that the decision below has worked any hardship at all.[44]

* * * * *

EAJA is only a little more than ten years old. Especially in its early years, before *Hudson* and *Finkelstein*, there was uncertainty on the part of both claimants and the Secretary about how the statute worked, and how it

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[42] In addition, the district court, which addressed the merits of petitioner's fee application, held (correctly in our view) that petitioner is not entitled to EAJA fees in any event because the government's position was substantially justified. J.A. 19-21.

[43] Petitioner points out (Br. 43) that the form sent to the U.S. Attorney after the Appeals Council decision stated: "If appropriate, have the action discontinued or dismissed." J.A. 17-18. The form of course did not state that dismissal *was* appropriate in this case. Nor did it state that dismissal by the court was a prerequisite to commencing the 30-day filing period under EAJA.

[44] Although, for the reasons stated in the text, there is no basis for application of a judicially fashioned rule of nonretroactivity to petitioner's case, a claimant who has an EAJA application pending in court that is out of time under the position we urge could seek administrative relief by filing an application to extend the period for filing an action for judicial review of the Secretary's post-remand decision under 42 U.S.C. 405(g). Section 405(g) and implementing regulations permit such extensions for "good cause" shown, even after the 60-day period has elapsed. 20 C.F.R. 404.911, 404.982, 416.1411, 416.1482. If such an extension were granted, the post-remand decision would not be a "final judgment" within the meaning of EAJA until the time for appeal had expired, and the claimant would then have an opportunity to file a timely EAJA application.

meshed with the review provisions of the Social Security Act. The *Hudson* and *Finkelstein* decisions have eliminated much of the uncertainty. This case presents an opportunity to clarify a remaining question in a way that is consistent with the governing statutes and with those decisions, and that will prove beneficial to all concerned.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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